

United States  
Circuit Court of Appeals

For the Ninth Circuit. 17

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UNITED STATES OF AMERICA,  
Appellant,  
vs.

THE OREGON SHORT LINE RAILROAD  
COMPANY, a corporation, and SAINT PAUL-  
MERCURY INDEMNITY COMPANY OF  
ST. PAUL, a corporation,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the District of Idaho,  
Eastern Division.

FILED

JAN 30 1940

PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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Appellant,

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## INDEX.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer to complaint.....	28
Appeal:	
Designation of contents of record on.....	49
Notice of .....	45
Statement of points on.....	49
Attorneys, Names and addresses of.....	1
Complaint .....	2
Exhibit A—Report re Shoshone and Ban- nack Indians .....	13
Certificate of clerk to Supplemental Transcript of Record .....	47
Certificate of clerk to Transcript of Record.....	46
Designation of contents of record on appeal.....	49
Judgment .....	44
Minutes of the Court (March 13, 1939).....	27
Minutes of the Court (July 31, 1939).....	35
Motion for more definite statement or for bill of particulars, filed December 31, 1938.....	24
Motion for more definite statement or for bill of particulars, filed January 9, 1939.....	25
Motion to strike.....	34

Names and addresses of attorneys.....	1
Notice of appeal.....	45
Notice of motion for judgment.....	34
Opinion .....	36
Order, amended, denying motion to strike and for judgment .....	44
Order denying motion for more definite state- ment .....	27
Order denying motion to strike and for judg- ment .....	43
Return on service of writ.....	21
Statement of points on appeal.....	49
Summons .....	21

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

JOHN A. CARVER,

United States District Attorney,

E. H. CASTERLIN,

PAUL S. BOYD,

Assistant United States District Attorneys,

Boise, Idaho,

Attorneys for Appellant

GEORGE H. SMITH,

Salt Lake City, Utah,

H. B. THOMPSON,

L. H. ANDERSON,

Pocatello, Idaho,

Attorneys for Appellees. [2\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and  
for the District of Idaho, Eastern Division

No. 1069

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD  
COMPANY, a corporation, and SAINT PAUL-  
MERCURY INDEMNITY COMPANY OF  
ST. PAUL, a corporation,

Defendants.

### COMPLAINT

Comes now John A. Carver, the duly appointed, authorized, acting and proper United States Attorney for the District of Idaho, and for a cause of action against the above named defendants and in favor of the above named plaintiff, alleges as follows:

#### I.

That the said John A. Carver institutes and brings this action in the name of the United States of America for and on behalf of the Shoshone and Bannock tribes of Indians for damages accruing by reason of the killing and maiming of certain Indian persons hereinafter named, and in the manner and form hereinafter described.



## II.

That the United States District Court for the District of Idaho has jurisdiction of this action for the reason that the United States of America is party plaintiff herein, and for the further reason that the said action is authorized and directed by the provisions of an Act of Congress under date of September 1, 1888 (25 Stat. L. 452).

## III.

That the defendant, Oregon Short Line Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Utah; that said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal [3] place of business in Idaho at the City of Pocatello in the State and District of Idaho, Eastern Division.

## IV.

That said defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah and Northern Railway Company, a railway company named in the Act of Congress herein above mentioned, to-wit: 25 Stat. L. 452.

## V.

That the defendant, Saint Paul-Mercury Indemnity Company of St. Paul is a corporation organized and existing under and by virtue of the laws

of the State of Delaware and doing and authorized to do business in the State and District of Idaho with an agent upon whom process may be served in the State of Idaho as provided for in Title 6, Section 7, U. S. C. A.

## VI.

That on the third day of July 1868, at Fort Bridger in the territory of Utah, the United States of America on behalf of its citizens, and the Shoshone and Bannock tribes of Indians on behalf of its members, in order to maintain peace among the parties, made and concluded a treaty wherein said parties solemnly agreed, among other things, as follows:

“And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this Article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.” (15 Stat. L. 673—11 Kappler 1021)

That the Indian reservation and territory therein above referred to is the Fort Hall Indian Reserva-

tion in the State and District of Idaho; that the said defendant, Oregon Short Line Railroad Company or its predecessor, was not one of the persons designated or authorized to go upon said lands in said treaty. [4]

#### VII.

That the said Indians for whom said territory and lands were reserved, dreaded the approach of the white man's commerce, and particularly the approach of the locomotive and/or iron horse, a dangerous instrumentality which said Indians anticipated would multiply the probability of death and destruction among members of their respective tribes and their descendants.

#### VIII.

As a consequence of the matters and things herein above set forth and in order that commerce and civilization might cross the prairies and extend to the Pacific coast, and that a railroad, the predecessor of the said Oregon Short Line Railroad Company, be privileged to operate over said Indian Reservation, the Congress of the United States of America reconsidered the treaty provisions herein above referred to as will more particularly appear in a report made to Congress from the Committee on Indian Affairs, referred to the House calendar and ordered to be printed on June 5, 1888, a copy of which said report is hereto attached, marked Exhibit A and by reference made a part hereof. That it was the intention of Congress as therein ex-

pressed and provided that every interest of the Shoshone and Bannock tribes of Indians be jealously guarded and protected against damages in all cases suffered by the Indians on account of the privilege to be granted said railroad.

### IX.

That in order to carry said intention into effect and for the purpose of jealously guarding and protecting said Shoshone and Bannock tribes of Indians and their posterity and in consideration of permitting and granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the said Congress of the United States and said Indians entered into a further memorandum of agreement and the said Congress enacted a statute under date of September 1, [5] 1888 (25 Stat. L. 452) providing among other things, that said Utah and Northern Railway Company, its successors and assigns, execute a bond in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians, the conditions of said bond being by statute provided as follows:

“That said railway company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes

of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes or either of them or of their livestock, in the construction or operation of said railway or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States;”

That the memorandum agreement herein mentioned is contained in the Act of Congress of September 1, 1888 hereinabove referred to.

#### X.

That the defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah Northern Railway Company and as such the said defendant is now and at all times material to this action has, by reason of the terms of said solemn treaty herein mentioned as modified by said memorandum agreement herein referred to and by virtue of the special Act of Congress mentioned herein, operated and maintained a railroad system running railroad engines, cars and trains, across, over, through and upon said Fort Hall Indian Reservation.

## XI.

That for the privilege of maintaining and operating said railroad trains, engines and cars, over, through and across said Fort Hall Reservation and by reason of the provisions of said treaty agreement, and the Act of Congress herein mentioned and by reference made a part hereof, the defendants, Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company of St. Paul, made, executed and delivered to the United States for the use and benefit of [6] the Shoshone and Bannock tribes of Indians and parties in interest, a bond as required by said special Act and in consideration of the privilege herein referred to, the said bond being in words and figures as follows, to wit:

## “BOND

“Be it known, That we, the undersigned, Oregon Short Line Railroad Company, a corporation, successor to the Utah and Northern Railway Company, as principal, and Saint Paul-Mercury Indemnity Company of Saint Paul as surety, are held and firmly bound unto the United States of America in the penal sum of ten thousand dollars (\$10,000), lawful money of the United States, for which payment, well and truly to be made, we and each of us bind ourselves, our successors, assigns, heirs, administrators, and executors, jointly and sever-

ally, firmly by these presents. The condition of this obligation is such that,

“Whereas, The Congress of the United States, by the Act of September 1, 1888 (25 Stat. L., 455), granted a right of way to the Utah and Northern Railway Company over and across the Fort Hall Indian Reservation in the State of Idaho, and

“Whereas, Section 14 of said act requires that the company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of \$10,000, for the use and benefit of the Shoshone and Bannock Tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live stock, in the construction or operation of said railway, or by reason of fires originating thereby;

“Now, therefore, if the said Oregon Short Line Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.

“Signed, sealed, and delivered, on this 30th day of July, A. D. 1935.

OREGON SHORT LINE  
RAILROAD COMPANY

(Principal)

[Seal] By (s) C. R. GRAY  
Its President

Attest:

[Seal] (s) E. M. KINDLER  
Assistant Secretary

[Seal] SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL  
(Surety)

By WM. F. PATTERSON  
Attorney-in-fact

Department of the Interior  
Washington

Approved

(s) OSCAR T. CHAPMAN  
Assistant Secretary  
5-3 (undecipherable)” [7]

XII.

That the said defendants by reason of said bond and the laws applicable thereto, became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed or maimed, to make due payment for all damages accruing therefrom; that the said defendants agreed and promised according to the terms of said bond to



make due payment for any and all damages accruing by the killing or maiming of any Indian belonging to either of the tribes herein above mentioned and agreed and promised to pay said bond and/or obligation according to its tenor and the provisions of the Act of Congress herein above referred to, and that damages be paid in all cases in the absence of an amicable settlement made by said defendants.

### XIII.

That on the 19th day of January, 1938, the defendant, Oregon Short Line Railroad Company, while operating a railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the Fort Hall Agency Road near corner section 35-36, T. 4 S., R. 34 E. B. M., the same being on the said Fort Hall Indian Reservation in the County of Bingham, State and District of Idaho, ran said railroad train into a Ford V-8 automobile occupied by Ira Ninnevo, Esther Queep, Daisy Thomas, Genevieve Queep and an unborn infant of Esther Queep, the said persons being Indians and members of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Indian Reservation and persons for whose benefit the treaty, agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed and the said persons being wards of the United States Government and having a right to be on said Fort Hall Reservation and at the place and point

where said Indian persons were maimed, killed, mutilated and destroyed; that the said railroad train operating as aforesaid did run into and kill, main and injure said Indian persons as follows, to wit: killed Ira Ninnevo, Esther Queep, Daisy Thomas, the unborn infant of Esther Queep; injured and maimed Genevieve Queep, a minor Indian person of [8] the age of about five years, in that the said train at the time of the collision herein mentioned did cut, bruise and injure about the head, legs and body the said Genevieve Queep.

#### XIV.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever or at all with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, herein above referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made. That the funeral expenses incurred for the burial of the Indian persons killed as herein above set forth amounts to approximately \$2,500. That by reason of the matters and things herein alleged and set forth there is due, owing and unpaid from the defendants to the plaintiffs for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest the sum of \$10,000. That the Shoshone and Bannock tribes

of Indians and the heirs, representatives and parties in interest of the deceased persons have been damaged in excess of \$10,000.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000 with interest thereon until paid and for its costs and disbursements herein incurred.

**JOHN A CARVER**

United States Attorney for  
the District of Idaho

**FRANK GRIFFIN**

Asst. U. S. Attorney for  
the District of Idaho

(Duly verified) [9]

**EXHIBIT A**

**“SHOSHONE AND BANNACK INDIANS**

---

June 5, 1888—Referred to the House Calendar and  
Ordered to be printed.

---

Mr. Perkins, from the Committee on Indian  
Affairs, submitted the following

**REPORT**

(To accompany bill H. R. 8662.)

The Committee on Indian Affairs, to whom was referred the bill (H. R. 8662) to accept and ratify an agreement made with the Shoshone and Bannack Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall

Reservation, in the Territory of Idaho, for the purpose of a town-site, and for the *grant* of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes, has carefully considered the provisions of the bill, and recommend that it do pass, and submit the following report:

This bill was drawn in the Interior Department and is intended to fully cover and protect the interest of the Indians concerned and to provide room for railroad shops and a town-site, imperatively demanded by the necessity of the case, as set forth in the following extracts from a letter from the honorable Secretary of the Interior, dated February 4, 1888:

(1) The Utah and Northern and Oregon Short Line Railroads cross each other and form a junction at a point within the boundaries of the reservation known as Pocatello Station, where a settlement has gradually grown up, composed mainly of employes of said railroads, with their families, together with other people drawn thereto, for whom sufficient land is represented to be absolutely needed for dwelling and for other purposes, to avoid the conflicts and troubles with the Indians arising from trespass upon the reservation; and,

(2) To ascertain and fix the compensation that should be paid to the Indians for land occupied by the Utah and Northern Railway Company as right of way, station grounds, etc.,

upon the reservation for its line of road, running north and south, already constructed and in operation. The right of way of the Utah and Northern Railway Company through the reservation, granted by the Act of July 3, 1882 (22 Stat. 148), for its Oregon branch running east and west, reported as subsequently assigned to the Oregon Short Line Railway Company, is 100 feet wide, except at Pocatello Station, where it is 200 feet wide with an additional tract at that point comprising 30.45 acres for station purposes, making a total of about 772 acres, for which it was required to pay \$6,000, being at the rate of about \$7.77 per acre.

Under the law granting the right of way (200 feet wide) to the Utah and Northern Railway Company through the public lands (17 Stats., 612), as subsequently amended (20 Stats., 241), that corporation filed in the Department a series of fifteen maps of definite location of its road, eleven of which were approved March 6, 1882; the other four, showing the line of the road through the fort Hall Reservation, were disapproved March 27, 1882, for the reason that the law granting right of way through the public domain did not entitle it to go through the Indian reservation, which is not public lands within the meaning of the act, and, further, that the consent of the Indians had not been formally obtained, and no compensation had

been made to them for the land occupied, the road having already been constructed. A detailed history of this matter is set out in a message sent by you to Congress on the subject December 21, 1885, and printed in Senate Ex. Doc. No. 20, Forty-ninth Congress, first session.

\* \* \* \* \*

As the embarrassments of the situation, resulting from the rapid growth of population of the town within the limits of the reservation and upon the land of the Indians, were daily increasing, the Department in order to place the matter in shape for definite and speedy action by Congress, instructed one of the United States Indian inspectors and the United States Indian agent for the Fort Hall Indian Agency to confer with the Indians, examine the whole matter, and prepare a plan for the settlement of the questions involved. They called the Indians together in council, to whom, it is reported, they carefully and fully explained the matters, and negotiated with them the agreement herewith submitted, for which the Indians cede and relinquish to the United States, to be disposed of for town-site purposes, at Pocatello, or otherwise, as Congress may direct, for the benefit of the Indians, a tract of 1,840 acres of land, saving therefrom as much as has been heretofore and is by the present agreement relinquished to the United States for the use of the Utah and Northern

and the Oregon Short Line railroads, all of which is more clearly shown in the accompanying plats.

The right of way to the Utah and Northern Railway Company through the reservation, north and south, provided for in the agreement, is 200 feet wide (the same as allowed to it through the public domain); this, with the rights of way 200 feet wide at Pocatello Station, already granted by law (22 Stat., 148) to the same company for its line running east and west, make a total width of 400 feet as right of way for the two roads at that point, and the 30.45 acres already granted by law for station and depot purposes to one road, together with the 20 acres for like purposes provided by this agreement for the other road, make a total of 50.45 acres for station and depot purposes for the two roads at their junction at Pocatello Station. The two roads at that point are constructed and run for some distance on the same road-bed, and use in part the same rails (one being a narrow-gauge road); in view of which it is considered by the Department that the right of way to the Utah and Northern Railway Company for its road running north and south should be there limited to 100 feet in width, making a total right of way 300 feet wide for both roads at Pocatello Station. The draught of the bill has been so framed as to provide for this limitation; this with the ample station

and depot grounds there, would seem to afford sufficient land for the ordinary business of the two railroads, reported by the Commissioner of Railroads to be now under one and the same management—that of the Union Pacific Railway Company.

\* \* \* \* \*

The draught of bill provides that the land ceded for the townsite (except the portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the town-site.

The junction of these two railroads at Pocatello will, it is believed, become a town of considerable size and business, assisting and benefited by the development of the country. In this age of progress it is impossible, and it certainly is not desirable, to hinder the building of railroads by blocking the natural routes by great reservations for Indians or for any other purpose. Every part of our country must be brought in communication by the best means with every other part, and when



the railroad companies ask nothing but the right of way they should have it in the interest of the people. By this bill the Utah and Northern Railway Company are to pay at the rate of \$8. per acre for the right of way and station grounds; 1,840 acres are to be surveyed and sold at not less than \$10 per lot, the money to be paid to the Secretary of the Interior and to bear interest at 5 per cent. per annum, and principal and interest to be expended according to his judgment for the support and benefit of the said Indians. This land is now of no benefit to them, and the money for which it is to be sold can be most usefully and profitably invested for them in irrigating ditches, houses, cattle, wagons and implements, wheat, etc. The town, which will certainly grow up, will give them a convenient market for their farm productions and will exercise a most salutary and civilizing influence upon them. The rights of the settlers upon the reservation to be sold in lots, are fully protected by the bill.

The fifteenth section of the bill takes from the railway company any inducement to "assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their remaining lands", or to "attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided".

It is provided that when any of the lands granted to the railway company for right of way and station grounds shall cease to be used for purposes

specified, it shall revert to the Indians. All employes of the railway company living on the granted lands shall be subject to the provisions of the Indian intercourse laws and such rules and regulations as may be established, etc. Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through the improved lands of the Indians. We believe, in short, that every interest of the Indians has been jealously guarded and protected.

It is the settled policy of Congress to encourage the settlement of the lands in the Territories and the development of their vast natural resources, that not only homes for our people may be provided, but fields for the exercise of their industry, energy, enterprise, labor, and capital may be opened up. These objects can best be accomplished by the building of lines of swift and easy communication and transportation by private capital, and therefore we think no great body of land should be reserved for any purpose to stand as an impediment to these great thoroughfares of the people.”

[Endorsed]: Filed Dec. 13, 1939.

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendants:

You are hereby summoned and required to serve upon John A. Carver, United States District Attorney for the District of Idaho, plaintiff's attorney, whose address is Boise, Idaho an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be against you for the relief demanded in the complaint.

[Seal] W. D. McREYNOLDS,  
Clerk of Court.

By ETHEL HOUSE,  
Deputy Clerk.

Date: November 13th, 1938.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, I received the within summons.

Nebraska		Idaho	
Marshal's Costs		Marshal's Costs	
Service	\$2.00	Fees	6.00
Mileage	.....	Exp	.....
Expense	.....	Total	6.00
Total	\$2.00		

## RETURN ON SERVICE OF WRIT

United States of America,  
District of Idaho—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Oregon Short Line Railroad Company by handing to and leaving a true and correct copy thereof with H. B. Thompson, Statutory Agent for the Oregon Short Line Railroad Company, as shown by files in the office of the Secretary of State of Idaho personally at Pocatello Idaho in said District on the 16th day of December, A. D. 1938.

GEORGE A. MEFFAN

U. S. Marshal

By DAVE NICHOLS

Deputy

## MARSHAL'S RETURN

United States of America,  
District of Idaho—ss.

I hereby certify and return that I served the annexed Summons on the therein named Saint Paul Mercury Indemnity Company of St. Paul, a corp., by handing to and leaving a true and correct copy thereof with George W. Wedgewood, Commissioner of Finance of the State of Idaho and statutory agent for the Saint Paul Mercury Indemnity Co. of St. Paul, a corp., as shown by the files of the Secretary of State of Idaho at Boise, Idaho, in said District on the 19th day of December, A. D. 1938.

I further certify and return that I served the annexed Summons on the therein named Saint Paul Mercury Indemnity Company of St. Paul, a corp., by handing to and leaving a true and correct copy thereof with Oliver O. Haga, agent for said Saint Paul Mercury Indemnity Company of St. Paul, a corp., as shown by the records of the Clerk of the United States District Court, District of Idaho, personally at Boise, Idaho in said District on the 19th day of December, A. D. 1938.

Dated this 20th day of December, 1938.

GEORGE A. MEFFAN

United States Marshal

By JAMES W. AMES

Chief Deputy

RETURN ON SERVICE OF WRIT

United States of America,  
District of Nebr.—ss.

I hereby certify and return that I served the annexed summons on the therein-named The Oregon Short Line Railroad Company, a corporation by handing to and leaving a true and correct copy thereof with William Jeffers, President personally at Union Pacific Bldg., 15th & Dodge, Omaha, in said District on the 4th day of January, A. D. 1939.

GEORGE E. PROUDFIT

U. S. Marshal

By JEROME A. LANGAN

Deputy

He being the highest officer of the said corporation found within my district.

[Endorsed]: Filed Jan. 6, 1939.

---

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS

Comes now the defendant, Oregon Short Line Railroad Company, and demands and moves the court to require the plaintiff to furnish a more definite statement or bill of particulars, with respect to the complaint filed herein, in the following respects:

First: With respect to the funeral expenses, alleged in paragraph XIV of said complaint to have been incurred, amounting to approximately \$2,500.00, to show by whom said expenses have been incurred, to whom incurred, and specifically and particularly for what items, material and service with respect to each of said deceased Indians.

Second: With respect to the item of \$10,000.00 alleged in paragraph XIV of said complaint to be "due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest", to show specifically for and on behalf of whom said sum is demanded, and (a) by what

factual process, and (b) upon what legal or rational basis, said demand of \$10,000.00 is arrived at or demanded.

Said motion is based upon paragraph (e) of Rule 12 of the Rules of Civil Procedure for the District Courts of the United States, and the complaint filed herein.

GEO. H. SMITH

Address: Salt Lake City, Utah

H. B. THOMPSON (in person)

L. H. ANDERSON

Address: Pocatello, Idaho

Attorneys for Defendant, Oregon  
Short Line Railroad Company

Receipt, and service of copy, of the foregoing motion is hereby admitted this 31st day of December, 1938.

JOHN A. CARVER

E. H. CASTERLIN

FRANK GRIFFIN

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 31, 1938.

---

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATE-  
MENT OR FOR BILL OF PARTICU-  
LARS

Comes now the defendant, Saint Paul-Mercury Indemnity Company, of St. Paul, and demands and moves the court to require the plaintiff to furnish a

more definite statement or bill of particulars, with respect to the complaint filed herein, in the following respects:

First: With respect to the funeral expenses, alleged in paragraph XIV of said complaint to have been incurred, amounting to approximately \$2,500.00, to show by whom said expenses have been incurred, to whom incurred, and specifically and particularly for what items, material and service with respect to each of said deceased Indians.

Second: With respect to the item of \$10,000.00 alleged in paragraph XIV of said complaint to be "due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and the parties in interest", to show specifically for and on behalf of whom said sum is demanded, and (a) by what factual process, and (b) upon what legal or rational basis, said demand of \$10,000.00 is arrived at or demanded.

Said motion is based upon paragraph (e) of Rule 12 of the Rules of Civil Procedure for the District Courts of the United States, and the complaint filed herein.

GEO. H. SMITH

Address: Salt Lake City, Utah

H. B. THOMPSON

L. H. ANDERSON

Address: Pocatello, Idaho

Attorneys for Defendant: Saint Paul-  
Mercury Indemnity Company, of  
St. Paul



Receipt, and service of copy, of the foregoing motion is hereby admitted this 9 day of January, 1939.

JOHN A. CARVER

FRANK GRIFFIN

Attorneys for Plaintiff

[Endorsed]: Filed Jan. 9, 1939.

---

(MINUTES OF THE COURT)

[Title of Cause.]

Mar. 13, 1939

The defendants' motion for an order requiring a more definite statement and requiring the plaintiff to file a bill of particulars were argued before the court by H. B. Thompson, Esquire, on the part of the defendants and by Paul Boyd, Assistant District Attorney, on the part of the plaintiff.

The Court took the motions under advisement.

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[Title of Cause.]

Mar. 14, 1939

The Court at this time announced his conclusions on the defendant's motion for a bill of particulars and motion to require a more definite statement, and denied the same.

[Title of District Court and Cause.]

### ANSWER

Come now the defendants, and, for answer to the complaint filed herein, admit, deny and allege as follows:

#### First Defense

The complaint fails to state a claim against the defendants, or either of them, upon which relief can be granted.

#### Second Defense

##### I.

Admit the allegations contained in paragraphs I, II, III, IV, V and VI of said complaint.

##### II.

Deny each and every allegation contained and made in paragraph VII of said complaint.

##### III.

Answering paragraph VIII of said complaint, the defendants admit on June 5, 1888 a report was made to Congress by the Committee on Indian Affairs, copy of which said report is attached to the complaint filed herein marked Exhibit A and made a part thereof; and defendants admit that said report was made in connection with a proposal then pending before the said Congress of the United States to provide for a right of way for railroad purposes vesting in the predecessor of the defendant, Oregon Short Line Railroad Company, for a railroad operating in a general northerly and southerly direction across the Indian Reservation therein

mentioned. Defendants deny each and every other allegation contained and made in paragraph VIII of said complaint.

#### IV.

Answering paragraph IX of said complaint, defendants admit that an agreement was made and entered into on the 27th day of May, 1887, between the United States of America and the Shoshone and Bannock tribes of Indians occupying the Fort Hall Indian Reservation in the Territory of Idaho, and that said agreement was ratified and embraced within an Act of Congress approved September 1, 1888, being 25 Stat. L. 452, which said Act of Congress contains, among other things, the portion thereof quoted in Paragraph IX of [14] said complaint. Defendants further admit that said Act of Congress was passed in furtherance of the purpose to permit and grant the right to the Utah and Northern Railway Company, its successors and assigns, to operate and maintain a line of railroad theretofore constructed over and across said Fort Hall Indian Reservation. Defendants deny each and every other allegation contained and made in paragraph IX of said complaint.

#### V.

Answering paragraph X of said complaint, defendants admit that the defendant, Oregon Short Line Railroad Company, is the successor in interest of the Utah and Northern Railway Company and that at all times material to this action has by reason of the terms of the treaty and agreement with the Indians and Act of Congress mentioned

in said complaint, operated and maintained a railroad system, running railroad engines, cars and trains across the Fort Hall Indian Reservation. Deny each and every allegation contained in paragraph X not hereinbefore expressly admitted.

## VI.

Answering paragraph XI of said complaint, these defendants admit that pursuant to said Act of Congress approved September 1, 1888, mentioned in said complaint, but not otherwise, the defendants Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company, made, executed and delivered to the United States a bond as required by said Act of Congress in the words and figures set forth in paragraph XI of said complaint. The defendants deny each and every allegation contained and made in paragraph XI of said complaint not hereinbefore expressly admitted or denied.

## VII.

Answering paragraph XII of said complaint, these defendants admit that by reason of said Act of Congress and said bond they became obligated according to the terms thereof to pay such legal damages as might accrue to the members of the Shoshone and Bannock tribes of Indians by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, in the construction and operation of said railway. Said defendants deny that by reason of said bond and the law applicable

thereto, or either thereof, they, or either of them, became liable or obligated to pay any sum on account of the killing or maiming of any Indian occurring [15] without the fault or negligence of the said Utah and Northern Railway Company or the defendant, Oregon Short Line Railroad Company, successor thereto, and deny each and every allegation contained and made in said complaint not hereinbefore expressly admitted or denied.

### VIII.

Answering paragraph XIII of said complaint, defendants admit that on the 19th day of January, 1938, at a point where said railroad crosses what is known as the Fort Hall Agency road within the limits of the Fort Hall Indian Reservation, in Bingham County, State of Idaho, a locomotive engine owned and operated by the Union Pacific Railroad Company upon said line of railroad collided with an automobile occupied by Ira Ninnevo, Esther Queep, Daisy Thomas and Genevieve Queep, and admit that said persons had a right to be on the Fort Hall Indian Reservation and upon said highway at the time of said collision. These defendants have not knowledge or information to form a belief as to whether either, all, or any of said Indians were members of the Shoshone and Bannock tribes of Indians, or either of said tribes, and upon that ground deny each and every of said allegations, and each and every allegation contained and made in said complaint not hereinbefore expressly admitted or denied.

## IX.

Answering paragraph XIV of said complaint, the defendants admit that they have refused to make any settlement or pay any sum on account of the death or maiming of any of the Indians described in said complaint, but deny that any obligations were or have been incurred by these defendants, or either of them, under said bond and Act of Congress, or either thereof, on account of the death or injury to all or any of said Indians. The defendants admit that demand has been made upon them in the sum of \$10,000.00 by the plaintiff herein; they deny that funeral expenses were incurred for the burial of the Indians that were killed amounting to the sum of \$2,500.00, or any sum in excess of \$500.00; they deny each and every other allegations contained and made in said paragraph XIV of said complaint not hereinbefore expressly admitted or denied, and deny each and every allegation contained and made in all or any part of said complaint not hereinbefore expressly admitted or denied. [16]

## X.

## Third Defense

Further answering said complaint, and as a third, separate and distinct defense thereto, these defendants allege that the plaintiff herein seeks recovery solely upon the statute, 25 Stat. L. 452, and the bond given pursuant thereto; that said statute does not CREATE a right of action for the death of a human being, or provide any measure of damages

therefor; that said statute is merely one providing for the giving of a bond to secure the payment to the United States, for the use and benefit of the Shoshone and Bannock tribes on the Fort Hall Indian Reservation of damages which may lawfully accrue to them in consequence of the violation of their legal rights by the Utah and Northern Railway Company, or by the Oregon Short Line Railroad Company, as its successor, and not otherwise; that the bond sued upon is not, and can not lawfully be held to be, broader than the statute, or to create a liability or obligation broader than that provided by statute, and that to render judgment in favor of the plaintiff and against the defendants, or either of them, would deprive these defendants, and each of them, of property without due process of law, contrary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

Wherefore, the defendants, and each of them, pray that the plaintiff take nothing by its complaint and that said defendants be hence dismissed with their just costs and disbursements herein incurred.

GEO. H. SMITH

Residing at: Salt Lake City, Utah.

L. H. ANDERSON

Residing at: Pocatello, Idaho.

H. B. THOMPSON

Subscribing Attorney—Residing at:  
Pocatello, Idaho.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes Now the United States of America, plaintiff in the above-entitled action, and moves to strike from the answer of the defendants, filed herein on March 21, 1939, all of that part thereof designated as a Third Defense on the ground and for the reason that the same, and all of the same, is redundant, immaterial and impertinent.

JOHN A. CARVER

U. S. Attorney for the District  
of Idaho

PAUL S. BOYD

Asst. U. S. Attorney for the  
District of Idaho.

[Endorsed]: Filed July 13, 1939. [18]

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT ON  
THE PLEADINGS AND ADMISSIONS OF  
PARTY.

To H. B. Thompson, L. H. Anderson and George H. Smith, Attorneys for the above named defendants.

Please Take Notice that upon the complaint and answer filed herein, the undersigned will move this Court, in the Federal Building, Boise, Idaho, on the 31st day of July, 1939, at ten o'clock in the forenoon



of that day, or as soon thereafter as counsel can be heard, for an order giving summary judgment to the plaintiff pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings and the admissions of the defendants show that there is no genuine issue as to any material fact, except to the amount of damages due plaintiff, and that the moving party is entitled to a judgment as a matter of law, or for such other and further relief as the Court may deem just, with costs.

JOHN A. CARVER

U. S. Attorney for District of  
Idaho.

E. H. CASTERLIN

Ass't U. S. Attorney for the  
District of Idaho.

PAUL S. BOYD

Ass't U. S. Attorney for the  
District of Idaho.

[Endorsed]: Filed July 20, 1939. [18A]

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(MINUTES OF THE COURT)

Jul. 31, 1939

[Title of Cause.]

The plaintiff's motion to strike the third defense of the defendants from the answer, and the motion for judgment on the pleadings were argued before the Court by Paul S. Boyd and E. H. Casterlin, Assistant District Attorneys, on the part of the plain-

tiff and by H. B. Thompson, Esquire, on the part of the defendants.

Counsel for the respective parties requested the Court to consider and pass upon the sufficiency of the first cause of action in the plaintiff's complaint.

The Court took the matters under advisement.

[18B]

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[Title of District Court and Cause.]

OPINION

John A. Carver, United States District Attorney,  
E. H. Casterlin, Assistant United States District  
Attorney

Paul S. Boyd, Assistant United States District At-  
torney

All of Boise, Idaho,

Attorneys for the Plaintiff.

George H. Smith, Salt Lake City, Utah

H. B. Thompson, Pocatello, Idaho.

L. H. Anderson, Pocatello, Idaho.

Attorneys for the Defendants.

August 3, 1939

Cavanah, District Judge.

The United States brings this suit to recover the sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians as damages claimed to have accrued by reason of the killing or maiming of certain Indians belonging to the tribes on the Fort Hall Reservation, and predicates its

right to recover on Section 14, Chapter 936, 25 Stat. at large, approved September 1, 1888, and a bond given thereunder.

The defendants by their answer assert, first; that the complaint fails to state a claim against either of them upon which relief can be granted, and thereby presents the primary question arising for decision, of whether the defendants are liable where the complaint does not allege, nor the Statute and bond contain a provision that the defendant Railroad Company was negligent or at fault at the time of the accident.

The provision of the Statute provides: "Sec. 14. That said railway Company shall execute a bond [19] to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian, belonging to said tribes, or either of them, or of their live-stock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any Court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States: Provided, that all moneys so recovered by

the United States Attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the Credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.”

And the provisions of the bond provides: “Whereas, Section 14 of said Act requires that the company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of \$10,000. for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby;”

“Now Therefore, if the said Oregon Short Line Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, [20] or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.”

It will be observed that the language of the statute limits the liability “for due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian.” And the conditions of the bond are identical with the terms of the Statute, making the obligation of the bond for the

payment of "damages which may accrue by reason of the killing or maiming of any Indian," and does not provide that the killing must be by reason of the negligence or wrongful acts of the Railroad Company. Then what was the intention of Congress in using the words "damages which may accrue by reason of the killing or maiming of any Indian"? If the language used expresses the intention, reasonably intelligent and plain, the Court must accept it without modification by resorting to conjecture or construction. Congress must be presumed to use words in their ordinary and known signification; *Thompson v. U. S.* 246 U. S. 547; *Old Colony R. Co., v. Comm's* 284 U. S. 552-560. What then do the words, "damages which may accrue by reason of killing or maiming of any Indian" mean or convey? Accrue as that phrase is used by the Courts when in speaking of a cause of action is, at a time which an enforceable legal right arises. It is the possession of an enforceable legal right. *United States ex rel. Louisville Cement Company v. Interstate Commerce Commission*, 246 U. S. 638. The statute seems clear in granting to the United States the right to seek a recovery at the time of the killing of the Indians, and Congress had the power to require the railroad company to execute a bond to indemnify securing payment to the United States "conditioned for the due payment of any damages which may accrue by reason of the killing or maiming of any Indian", and when it did so, the inquiry then arises; can it make the railroad

company liable in all instances regardless of whether [21] it was negligent or its acts wrongful? We are now considering a statutory liability upon which the bond is based, and from it the right is granted to recover damages which may accrue, meaning an enforceable legal right. Then what constitutes a legal right, is it one granting to one the right to recover damages although the one sued be not negligent or at fault, or can it be reasoned that it would be a right not based upon a wrongful act or negligence of another? The term legal is that authorized by law; the observance of the forms of law, and the act is one rightful in substance, and moral quality is observed. Should the statute be construed as excluding the right to assert that the railroad Company was not negligent or at fault, and that the proximate cause of the injury was due to the negligence of the deceased Indians, it would be ignoring the definition of the term legal, which requires the act complained of to be one rightful in substance. It would not be rightful for one to recover damages if the proximate cause of the injury was due by reason of his own fault, and not the negligence or wrongful act of the one sued.

If Congress intended to exclude the right of defense of lack of negligence or wrongful act by the railway company or that the Indians may have been guilty of contributory negligence, it would have done so by inserting such words in the Statute. The Statute does nothing more than grant the right

for the payment of damages which may accrue by reason of the killing or maiming of an Indian, and does not exclude a consideration of the circumstances under which the accident occurred. General terms in a statute should be so limited in their application as not to lead to injustice. *White v. Hopkins*, 51 Fed. (2) 162. There are many statutes couched in general terms recognizing the right to recover, such as the possession of real and personal property, debt, conversion, libel, damages etc., yet because they are, does not deny the defense of reviewing [22] the circumstances under which the act complained of occurred or that the plaintiff may have been, by reason of some act of his, negligent or at fault preceding or at the time of the occurrence. The construction here given to the Statute is not reading into it or deducting from it any words, only giving the same construction as is given to similar statutes phrased in general terms.

Although no doubt exists as to the thought thus expressed being the correct construction of the terms of the Statute, the Statute will not be construed as taking away a common law right unless such common law right is, by express words, embodied in the Statute, and Courts will be reluctant to construe such a Statute in derogation of the common law. *Globe & Rutgers Fire Insurance Co., v. Draper* (9th C) 66 Fed. (2) 985. The expression in the Statute "in the event of failure by the Railway Company to effect an amicable settlement with

the parties in interest", clearly indicates that Congress intended that the Railway Company and the parties had the right to consider how the injury occurred, and not that the plaintiff could assert unconditional liability.

Stress is made that by reason of the treaties with the Indians and the committees' report prior to the enactment of the Statute, Congress intended to make it an UNCONDITIONAL LIABILITY in the event an Indian is killed or maimed by a railway company, but Congress has not done so by the terms of the Statute, which it had the power to enact, and has not by it taken away the common law right to assert lack of negligence or wrongful act or fault of the railway company or contributory negligence of the Indian. The Committee's report is only considered to solve a doubt and not where the language of the Statute is clear. The mere fact that the deceased were Indians would not warrant an interpretation of the Statute which conflicts with the acknowledged principles of justice where it is commonly [23] known that the Indians, a large number of which own and operate automobiles and are capable of driving them. To interpret as imposing absolute liability where the Statute only implies nothing more than the giving of a bond to pay accrued damages based upon a liability of a Statute not prohibiting a defense at common law and to deny an opportunity to be heard with respect to the negligence or fault of the railroad com-



pany or that the Indians were at fault does not provide "due process of law" provided for in the Constitution and in derogation of the common law. The Supreme Court of the State has clearly reached this conclusion when in considering a statute similar to the one in question. *Castril v. Union Pacific Railway Company*, 2 Idaho 576; 21 Pac. 416.

The railroad company was required under the Statute to pay to the United States \$8.00 per acre for its right of way of 200 feet in width through the reservation in the operation of its road, to be used for the benefit and support of the Indians, which removes any impression that the railway company had secured its right-of-way free.

In view of the conclusions thus reached, that the complaint does not state facts sufficient to constitute a cause of action, the first ground of defense appearing in the answer is sustained and the motions of the plaintiff to strike, and for summary Judgment is denied.

[Endorsed]: Filed August 4, 1939. [24]

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[Title of District Court and Cause.]

ORDER

In harmony with written memorandum opinion filed on this date, in the above entitled cause, it is Ordered that the defense of the defendants, that the complaint does not state a claim against either of them upon which relief can be granted is sus-

tained, and the motions of the plaintiff to strike and for judgment on the pleadings are denied.

Dated August 4, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed Aug. 4, 1939. [24A]

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[Title of District Court and Cause.]

### AMENDED ORDER

In harmony with written memorandum opinion filed on the 4th day of August 1939, in the above entitled cause, it is Ordered that the defense of the defendants that the complaint does not state a claim against either of them upon which relief can be granted is sustained, and the motions of the plaintiff to strike and for a summary judgment are denied.

Dated August 5th, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed August 5, 1939. [25]

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[Title of District Court and Cause.]

### JUDGMENT

An amended order having been made herein on the 5th day of August, 1939, by which it was or-

dered that the defense of the defendants that the complaint did not state a claim against either of them upon which relief could be granted was sustained, and the motions of the plaintiff to strike and for summary judgment were denied, and the plaintiff having elected not to proceed further but to stand upon said complaint, and the time for said plaintiff to so further plead having expired, now, therefore,

It Is Ordered and adjudged that said complaint be and the same hereby is dismissed.

Dated, September 19th, 1939.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed September 19, 1939. [26]

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the above named plaintiff, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment dismissing plaintiff's complaint made and entered in this action on September 19, 1939, and from the whole thereof.

Dated this 9th day of December, 1939.

**JOHN A. CARVER**

United States Attorney for the  
District of Idaho

**E. H. CASTERLIN**

Assistant U.S. Attorney for the  
District of Idaho

**PAUL S. BOYD**

Assistant U. S. Attorney for the  
District of Idaho

Attorneys for Plaintiff.

(Copy of Notice of Appeal mailed to H. B. Thompson, of counsel for Defendants, on December 9, 1939 by Clerk)

[Endorsed]: Filed December 9, 1939. [27]

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[Title of District Court and Cause.]

**CERTIFICATE OF CLERK OF UNITED  
STATES DISTRICT COURT TO TRAN-  
SCRIPT OF RECORD**

United States of America,  
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 33 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to

the hearing of the appeal therein in the United States Circuit Court, in accord with designations of contents of record on appeal of the appellant and appellees, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$5.10, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 18th day of December, 1939.

[Seal]

W. D. McREYNOLDS,

Clerk.

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United States of America,  
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of:

1. Exhibit "A" attached to the complaint
2. Motion for More Definite Statement or for Bill of Particulars, filed Dec. 31, 1938
3. Summons together with returns thereon
4. Motion for more definite Statement or for Bill of Particulars, filed Jan. 9, 1939

5. Minutes of the Court, Mar. 13, 1939
6. Minutes of the Court, Mar. 14, 1939
7. Motion to Strike, filed July 13, 1939
8. Notice of Motion for Judgment on the Pleadings and Admissions of Party
9. Minutes of the Court, July 31, 1939
10. Order, filed Aug. 4, 1939
11. Appellees' Designation of Contents of Record on Appeal

Filed in the Case of United States of America, vs. The Oregon Short Line Railroad Company, a corporation, et al, No. 1069, Eastern Division, have been by me compared with the originals and that they are correct transcripts therefrom and of the whole of such originals as the same appear of record and on file in my office and in my custody.

I further certify that the above listed papers constitute all papers which have been filed in the said cause, and not included in the certified transcript on appeal of said cause to the United States Circuit Court of Appeals for the Ninth Circuit.

In Testimony Whereof, I have set my hand and affixed the seal of said Court in said District this 29th day of December, 1939.

[Seal]

W. D. McREYNOLDS,

Clerk

By ETHEL HOUSE

Deputy

[Endorsed]: No. 9403. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. The Oregon Short Line Railroad Company, a corporation, and Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed December 22, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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United States Circuit Court of Appeals for the  
Ninth Circuit

No. 9403

UNITED STATES OF AMERICA,

Appellant,

vs.

THE OREGON SHORT LINE RAILROAD  
COMPANY, a corporation, and ST. PAUL-  
MERCURY INDEMNITY COMPANY OF  
ST. PAUL, a corporation,

Appellees.

STATEMENT OF POINTS ON WHICH THE  
APPELLANT, UNITED STATES OF  
AMERICA, INTENDS TO RELY ON AP-  
PEAL, AND DESIGNATION OF RECORD.

Comes now the appellant, the United States of  
America, by its undersigned solicitors and respect-

fully represents to this Honorable Court that in the above styled and numbered cause it intends to rely upon the following statement of points on appeal:

### I.

That the Act of September 1, 1888, c. 936, 25 Stat. 452, imposes absolute liability upon the railroad company to pay for damages caused by the operation of the railroad without regard to negligence.

### II.

If the statute is construed to impose absolute liability on the railroad, under the circumstances of this case the railroad cannot assert unconstitutionality of the statute at this time.

### III.

Assuming the railroad could inquire into the constitutionality of the Act of September 1, 1888, that statute when so construed is constitutional and does not violate the "due process clause" of the Fifth Amendment of the Constitution of the United States.

The appellants deem the entire record as filed to be necessary for the consideration of the contentions above enumerated.



Dated this 3rd day of January, 1940.

Respectfully submitted,

JOHN A. CARVER

United States Attorney for the  
District of Idaho.

E. H. CASTERLIN

Assistant United States Attor-  
ney for the District of Idaho.

PAUL S. BOYD

Assistant United States Attor-  
ney for the District of Idaho.

Service of the foregoing and receipt of copy this  
6th day of January, 1940, is hereby acknowledged.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Appellees

[Endorsed]: Filed Jan. 10, 1940. Paul P.  
O'Brien, Clerk.

